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United States v. Curtiss-Wright Export Corporation: An Historical Reassessment

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War between Paraguay and Bolivia broke out in June 1932.¹ Because both belligerents depended on outside military assistance, American armament manufacturers found the situation attractive, particularly in view of the depressed economy at home. But national anti-war sentiment, revulsion at the slaughter in the Gran Chaco, and the urgings of Great Britain and the League of Nations prompted the American government to terminate the developing arms trade. On May 24, 1934, six days after it had been introduced, Congress approved a Joint Resolution providing that "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries engaged in conflict in the Chaco may contribute to the establishment of peace between those countries," he might proclaim an embargo on American arms shipments to the belligerents. Violators would be fined, imprisoned, or both.² Franklin D. Roosevelt

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1. For general historical background, see Divine, *The Case of the Smuggled Bombers*, in *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 210-21 (J. Garraty ed. 1966), on which I have relied for otherwise undocumented details in this and the following paragraph. For early analyses of *Curtiss-Wright*, see Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946); Patterson, *In re The United States v. The Curtiss-Wright Corporation* (pts. 1-2), 22 *TEXAS L. REV.* 286, 445 (1944); Quarles, *The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated?*, 32 *GEO. L.J.* 375 (1944). These commentators are too ready to relegate parts of the opinion to the status of dicta, and they neglect the true implications of the "Story-Wilson" position. See pp. 13-24 *infra*. Recently, Raoul Berger has offered a more perceptive analysis of the historical evidence, although without, in my opinion, adequately confronting the dicta issue. See Berger, *War-Making by the President*, 121 *U. PA. L. REV.* 29, 69-75 (1972); Berger, *The Presidential Monopoly of Foreign Relations*, 71 *MICH. L. REV.* 1, 26-33 (1972). Berger's articles became available after the present article was largely completed; I am gratified that his studies, while less detailed specifically on *Curtiss-Wright*, generally support my own conclusions. For evidence of the continued legal relevance of the opinion, see, in addition to the statements cited in notes 12-30 *infra*, L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 19-35 *passim* (1972). Henkin states that the opinion "remains authoritative doctrine." *Id.* at 25-26.

2. 48 Stat. 811 (1934). See note 33 *infra* for the complete text of the Joint Resolution.

signed the Joint Resolution and issued an embargo proclamation on May 28.³

Curtiss-Wright Export Corporation, two associated companies, and four corporate officers were indicted in January 1936 for conspiring to sell aircraft machine guns to Bolivia in violation of the congressional resolution and presidential proclamation.⁴ The defendants demurred to the indictment, arguing that the Joint Resolution unconstitutionally delegated legislative power to the Executive.⁵ Agreeing, the district court ruled for the defendants.⁶ This decision threatened the neutrality legislation which was evolving in response to European events; therefore the government appealed. Despite prior decisions evincing hostility to excessive delegations of power,⁷ the Supreme Court in *United States v. Curtiss-Wright Export Corporation* reversed the lower court decision seven to one.⁸ Whatever danger the lower court decision posed to the neutrality acts was ended, but in the process several propositions were enunciated and approved that were and continue to be extremely controversial and ambiguous. Justice George Sutherland's opinion for the Court recognized sweeping federal and, more specifically, presidential power in the area of international affairs; it also seemed to free Congress from the need to formulate precise standards when it delegated power involving foreign relations.⁹

As early as 1940-1941, during the first of what Alfred H. Kelly has called the "two decisive 'breaks' in the continuity of peace-war relationships between the Executive and the Congress,"¹⁰ *Curtiss-Wright*

3. 48 Stat. 1744 (1934).

4. Indictment, in Transcript of Record at 3, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

5. *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230, 232 (S.D.N.Y. 1936) [*Curtiss-Wright (S.D.N.Y.)*]. Defendants also demurred on two grounds not relevant to this article: (1) Roosevelt's proclamation failed to meet the requirements set forth in the Joint Resolution, and (2) the defendants had been indicted after the President revoked his proclamation. The district court decided for the government on both points and the Supreme Court affirmed. *Id.* at 232, 235-38; 299 U.S. at 330-33.

6. *Curtiss-Wright (S.D.N.Y.)* at 240 (on rehearing).

7. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). See also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

8. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) [*Curtiss-Wright*]. Justice McReynolds dissented without opinion and Justice Stone took no part in the case. *Id.* at 333.

9. See *id.* at 315-29.

10. Prepared Statement of Professor Alfred H. Kelly, March 9, 1971, *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 89 (1972) [hereinafter cited as *1971 Senate War Powers Hearings*]. Kelly identified the second break as the 1950-1951 period when President Harry S. Truman, acting under his own authority as Commander in Chief and as chief foreign policymaker, committed troops to Korea and raised American force levels in Europe. *Id.* at 89-91. *Curtiss-Wright* also received some attention in this period. See, e.g., HOUSE COMM. ON FOREIGN AFFAIRS, BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES,

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received attention in arguments over the nature and distribution of federal power in foreign affairs.¹¹ More recently, during the Vietnam War, debate over constitutional problems in warmaking has led to renewed interest in *Curtiss-Wright*. No agreement on the meaning of the case has emerged on either of these occasions. Nor has the Supreme Court come to definite conclusions about its meaning; what emerges from the cases in which the Court has cited *Curtiss-Wright* is a variety of views not unlike the range of statements from nonjudicial commentators. Altogether, on and off the bench, the decision has been alleged to provide some degree of support for a number of propositions which can be grouped as follows:

1. The United States possesses all the powers of a sovereign nation.¹² Federal authority in foreign affairs is not subject to interference from the states.¹³ Even though the Constitution makes no grant to Congress, the existence of congressional power to legislate concerning foreign affairs cannot be doubted.¹⁴ But "congressional power in this sphere . . . is limited by the First Amendment."¹⁵

2. The President possesses inherent power in the foreign affairs field which *Curtiss-Wright* "explicitly and authoritatively define[s]."¹⁶

H.R. Doc. No. 127, 82d Cong., 1st Sess. 8, 11, 51 (1951). For a general discussion of the Korean War debate, see Lofgren, *Mr. Truman's War: A Debate and Its Aftermath*, 31 REV. OF POL. 223 (1969).

11. For this and the other conclusions in this paragraph see pp. 4-5 *infra*.

12. See *Dennis v. United States*, 341 U.S. 494, 519-20 (1951) (Frankfurter, J., concurring in result); notes 13 & 14 *infra*.

13. See *Clark v. Allen*, 331 U.S. 503, 517 (1947); *United States v. Belmont*, 301 U.S. 324, 331 (1937).

14. See *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

15. *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961). Justice Frankfurter, speaking for the Court, made this qualification after citing *Curtiss-Wright* to support the broad proposition.

16. See *Gravel v. United States*, 408 U.S. 606, 643-44 (1972) (Douglas, J., dissenting) (maintaining, however, that *Curtiss-Wright* required such presidential power to be exercised in compliance with the Constitution); *New York Times Co. v. United States*, 403 U.S. 713, 728-29 & n.3 (1971) (Stewart, J., concurring); *id.* at 741-42 (Marshall, J., concurring); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 661 n.3 (1952) (Clark, J., concurring); *Krauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *United States v. California*, 332 U.S. 19, 45 (1947) (Frankfurter, J., dissenting); Wright, *The Transfer of Destroyers to Great Britain*, 34 AM. J. INT'L L. 680, 680-81 & n.5 (1940); 39 OP. ATT'Y GEN. 484, 486-87 (1940) (quotation in text accompanying this note is at 486); citations in notes 17-23 *infra*. Cf. Prepared Statement of Secretary of State Henry Stimson, Jan. 29, 1941, *Hearings on a Bill to Promote the Defense of the United States* (S. 275) Before the Senate Comm. on Foreign Relations, 77th Cong., 1st Sess. 90-91 (1941) (S. 275 was the Senate version of the Lend-Lease Bill, H.R. 1776); *Hearings on Lend-Lease Bill Before the House Comm. on Foreign Affairs*, 77th Cong., 1st Sess. 334 (1941) (exchange between Norman Thomas and Representative James A. Shanley, Jan. 22, 1941); Prepared Statement of Senator Barry Goldwater, April 23, 1971, *1971 Senate War Powers Hearings*, *supra* note 10, at 355; Acheson, *The Eclipse of the State Department*, 49 FOREIGN AFFAIRS 593, 593-94 (1971). The extent of agreement on this proposition is well illustrated by the *New York Times* case. The three justices who cited *Curtiss-Wright*—Stewart and Marshall, both of whom concurred in the Court's decision, and Harlan, who dissented—all agreed that it

Accordingly, "the President is exclusively responsible" for "the conduct of diplomatic and foreign affairs";¹⁷ he is the "sole organ" of government with respect to foreign relations;¹⁸ and he may conclude international agreements not requiring the consent of the Senate.¹⁹ *Curtiss-Wright* raises a "serious question whether the Congress can constitutionally limit the President's powers in the field of our relations with foreign governments."²⁰ This interpretation also sanctions executive withholding of information pertaining to foreign affairs and national security from Congress²¹ and from the public.²² It similarly bolsters claims that the government need not reveal information related to national security, which was obtained without warrant through electronic surveillance, to defendants whose rights may be directly affected.²³

3. Legislation concerning foreign relations need not satisfy the same judicial tests applied in delegation decisions involving domestic matters.²⁴

supported an independent executive power in foreign affairs. (Marshall thought *Curtiss-Wright* was qualified in this regard by *Kent v. Dulles*, 357 U.S. 116 (1958), but that does not alter his assessment of the meaning of *Curtiss-Wright* itself.) See *New York Times Co. v. United States*, *supra* at 728-29, 741-42 & n.2, 756.

17. *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950).

18. See *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766-68 (1972) (Rehnquist, J., plurality opinion); *New York Times Co. v. United States*, 403 U.S. 713, 756 (1971) (Harlan, J., dissenting); *Hirata v. MacArthur*, 338 U.S. 197, 208 (1949) (Douglas, J., concurring); *Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103, 111 (1948); *United States v. Pink*, 315 U.S. 203, 229-30 (1942); Memorandum entitled "Termination of Hostilities" by the Legal Advisor, Green H. Hackworth, to the Sec'y of State, Dec. 20, 1941, 1 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1942, at 8, 12 (1960). Cf. TO PROMOTE THE DEFENSE OF THE UNITED STATES, H.R. REP. NO. 18, 77th Cong., 1st Sess., pt. 1, at 6-7 (1941); Prepared Statement of Senator Barry Goldwater, *supra* note 16, at 355.

19. See *United States v. Pink*, 315 U.S. 203, 229-30 (1942).

20. Memorandum entitled "The President's Powers under H.R. 1776 [the Lend-Lease Bill] and some Prior Instances of Presidential Power," in House Comm. on Foreign Affairs, File on H.R. 1776, National Archives, Washington, D.C. This memorandum was prepared in the Treasury Department and was probably written in January 1941. I am indebted to Congressman Jerry L. Pettis of California for assistance in securing a copy of this document. See W. KIMBALL, THE MOST UNSORDID ACT: LEND LEASE, 1939-1941, at 174-75 & n.56 (1969).

21. See Prepared Statement of Dean Acheson, July 28, 1971, in *Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 259, 260 (1971); Prepared Statement of William H. Rehnquist, Ass't Att'y Gen., July 29, 1971, *id.* at 428, 431, 433-34.

22. See Brief for the United States at 13-15, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *United States v. Marchetti*, 466 F.2d 1309, 1315 (4th Cir. 1972), *cert. denied*, 93 S. Ct. 553 (1973).

23. See Brief for the United States at 16, 31, *United States v. District Court for Eastern Dist. of Michigan, Southern Division*, 407 U.S. 297 (1972).

24. See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring); *Ex parte Endo*, 323 U.S. 283, 298 (1944); *Yakus v. United States*, 321 U.S. 414, 462 (1944) (Rutledge, J., dissenting); 87 CONG. REC. 491 (1941) (Representative Bloom); *id.* at 525 (Representative Richards); *id.* at App. 280 (radio address by Senator George); R. HULL & J. NOVOCROD, LAW AND VIETNAM 173-74

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4. Those portions of Sutherland's opinion which go beyond the issue of delegation in foreign affairs are dicta.²⁵ The decision does not legitimate loosely controlled delegation in the domestic area even though such delegation is associated with the conduct of foreign relations;²⁶ it does not obviate the need for senatorial approval of agreements with foreign powers;²⁷ and it does not affect Congress's power to declare war.²⁸

5. *Curtiss-Wright* says nothing about who is to make foreign policy (as opposed to who is to execute it).²⁹ In fact, *Curtiss-Wright* does not hold that looser standards are permissible in connection with delegation involving foreign affairs.³⁰

On several occasions the Court has rejected broad interpretations of the foreign relations power; it has nevertheless avoided directly attacking *Curtiss-Wright*.³¹ If anything, the uses to which the opinion has been put confirm that "[o]ne fact should not be overlooked—that the ambiguities of the opinion do not rule it out as available precedent."³² In view of the Court's continued use of the case and the ongoing debate over its meaning, it is important to take a close look at what Sutherland said and at the evidence he adduced in support of his position.

(1968); Jones, *The President, Congress, and Foreign Relations*, 29 CALIF. L. REV. 565, 575 (1941); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1802 (1968); Statement by W. Rehnquist on the President's authority to order the attack on the Cambodian sanctuaries, before the Society of International Law, June 16, 1970, reprinted in SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWERS OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER IN CHIEF AND THE WAR IN INDOCHINA 175, 181 (Comm. Print 1970); note 25 *infra*.

25. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring); 87 CONG. REC. 1605 (1941) (Senator Wheeler); Prepared Statement by Sec'y of State William P. Rogers, May 14, 1971, 1971 *Senate War Powers Hearings*, *supra* note 10, at 495-96 & n.47; Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT'L L. 690, 691 (1940).

26. See 87 CONG. REC. 517-19 (1941) (Representative Day).

27. See *id.* at 1347-48 (Senator Shipstead); *id.* at 1604-05 (Senator Wheeler).

28. See *id.* at 1605 (Senator Wheeler); Prepared Statement of Professor Alexander Bickel, July 26, 1971, 1971 *Senate War Powers Hearings* at 555. Wheeler had earlier contended that *Curtiss-Wright*, which he sometimes identified as "Wright Brothers against the United States," "contains the express language that only Congress can declare war and wage war." 87 CONG. REC. 1049 (1941). He implicitly corrected himself when he attributed (*id.* at 1605-06) the doctrine that "the term 'to declare war' necessarily connotes 'the plenary power to wage war'" to Justice Sutherland's opinion for the Court in *United States v. MacIntosh*, 283 U.S. 605 (1931), in which case, however, Sutherland was not carefully distinguishing between powers of the separate branches.

29. Pollak, *et al.*, *Indochina: The Constitutional Crisis—Part 2*, 116 CONG. REC. 16478, 16480 n.13 (May 21, 1970).

30. Prepared Statement of Professor Alexander Bickel, *supra* note 28, at 555; Bickel, *The Constitution and the War*, 54 COMMENTARY, July 1972, at 49, 52.

31. See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967); *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *Reid v. Covert*, 354 U.S. 1, 38-39 (1957) (Black, J., plurality opinion).

32. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 494 (1946).

I. Precedent versus Principle

Curtiss-Wright held that the Joint Resolution of May 28, 1934,³³ was not an unconstitutional delegation of congressional power to the President. To understand and assess Justice Sutherland's opinion, it must be viewed historically. At the outset one must remember that the Court had recently taken a very narrow view of the permissible scope of delegatory legislation.

In the *Panama*³⁴ and *Schechter*³⁵ cases, the Court required that delegatory legislation specify the policy it was designed to effectuate, establish a standard to monitor subsequent executive action, and state those findings of fact the President was required to make before acting.³⁶ On brief in *Curtiss-Wright* the government maintained that the Joint Resolution met these tests.³⁷ Considering the result in the lower court and the government's and defendants' arguments on appeal, the key issue was whether the Joint Resolution required a finding of fact.³⁸ On this point, the government contended:

The fact to be found by the President—whether prohibition of the sale of arms in this country may contribute to the reestablishment of peace in the Chaco—is not, as the defendants have contended, a vague matter of opinion merely, upon which only a guess might be made. On the contrary, it is an eminently practical question depending upon facts which were peculiarly available to the President The state of the war, which might vary widely and rapidly, the number and type of purchases in this country by each side, and the sales if no prohibition were imposed, which would depend upon the financial condition of the

33. *Resolved* . . . , That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

Sec. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding \$10,000 or by imprisonment not exceeding two years, or both.

48 Stat. 811 (1934).

34. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) [*Panama*].

35. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) [*Schechter*].

36. See *Panama* at 414-30; *Schechter* at 530-42.

37. Brief for the United States at 10, 16-17, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

38. See *Curtiss-Wright (S.D.N.Y.)* at 232-36, 239; Brief for the United States at 10-17, Brief for Appellees John S. Allard, Clarence W. Webster and Samuel J. Abelow at 10-21, Brief for Appellees Curtiss-Wright Export Corp. and Curtiss Aeroplane & Motor Co., Inc. at 16-26, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

belligerents, transportation facilities, and the like, were all factors which of necessity entered into his decision. Perhaps even more important was the fact of cooperation [with other countries]³⁹

These verbal gymnastics do not seem particularly persuasive in view of the *Panama-Schechter* tests. In *Schechter* the Court contended that in promulgating a Code under the National Industrial Recovery Act, one of "the finding[s] that the President is to make [is] that the code 'will tend to effectuate the policy of this title.' While this is called a finding, it is really but a *statement of an opinion* as to the general effect upon the promotion of trade or industry of a scheme of laws."⁴⁰ In consequence the NRA failed to meet one of the tests of valid delegation. The requirement in the Joint Resolution that the President find an embargo "may contribute" to the reestablishment of peace was no more precise. In addition, no hard and fast assessment could be made of those factors which the government claimed⁴¹ would determine the effect of the embargo. A judgment based on them would have amounted to the forbidden statement of opinion.⁴² Notwithstanding the view of a recent author, the Joint Resolution required the President to find more than "a necessary factual condition precedent."⁴³ And even if the Joint Resolution could be interpreted to require a finding, it failed to obligate the President to act once he had made the requisite finding. Contrary to the apparent requirement of *Panama* and *Schechter*⁴⁴ he retained absolute discretion to issue or not to issue a proclamation prohibiting arms shipments.⁴⁵

So Sutherland and the Court might have accepted the government's argument that the Joint Resolution met the *Panama-Schechter* tests,

39. Brief for the United States at 11, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (citations omitted).

40. *Schechter* at 538 (emphasis added).

41. See p. 6 *supra*.

42. A variety of international uncertainties attended the Chaco arms embargo, which was eventually implemented to greater or lesser degree by about thirty nations. See W. GARNER, *THE CHACO DISPUTE: A STUDY OF PRESTIGE DIPLOMACY* 92-98 *passim* (1966); Hudson, *The Chaco Arms Embargo*, INT'L CONCILIATION, No. 320, at 217 (1936).

43. Bickel, *The Constitution and War*, 54 COMMENTARY, July 1972, at 49, 52. I also think Professor Bickel is incorrect in stating: "The joint resolution closely defined what the President was to do, namely stay out of war" *Id.* The Resolution said nothing about keeping the United States out of the Chaco War. Rather, the Resolution authorized the President—if he concluded it might serve the purpose of peace in the Gran Chaco—to keep American armaments out of a war which hardly threatened to engulf the United States. Nor does Professor Bickel's overall discussion of *Curtiss-Wright* support this particular statement of his. See *id.*

44. Cf. *Panama* at 430; *Schechter* at 541.

45. See text of the Joint Resolution: "if . . . [the President] makes proclamation" 48 Stat. 811 (1936). See generally Brief for Appellees Curtiss-Wright Export Corp. and Curtiss Aeroplane & Motor Co., Inc. at 16-26, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

but an opinion bottomed on that contention would have been shaky. Certainly a more solid foundation was available: The resolution did not have to meet the *Panama-Schechter* tests, for it fell into a category of legislation which was not governed by the tests. This category, using Sutherland's own language, consisted of legislation whose "whole aim . . . is to affect a situation entirely external to the United States, and falling within the category of foreign affairs."⁴⁶

To establish and sanction such a category Sutherland might have followed the lead of the government on brief⁴⁷ and cited long-standing legislative and judicial precedent, but he rejected this simple course. Taking a more involved route, he began with the proposition that the discretion vested in the President was consistent with early American constitutional principles. It was in this context that Sutherland made his remarks about the inherent federal foreign relations power and the Executive's independent role in foreign affairs.⁴⁸ Only then did he review the series of "acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."⁴⁹ These acts,⁵⁰ he said, comprised "an impressive array of legislation . . . , enacted by nearly every Congress from the beginning of our national existence to the present day, [which] must be given unusual weight in the process of reaching a correct determination of the problem."⁵¹ The relevant rule had been set forth in several cases.⁵² As stated in *Field v. Clark*, "the practical construction of the Constitution, as given by so many acts of Congress, and embracing almost the entire period of our national existence, should not be overruled, unless upon a conviction that such legislation was clearly incompatible with the supreme law of the land."⁵³

But if legislative precedent was so compelling, why did it not dispose of the matter? Why did Sutherland not omit his sweeping remarks about the principles which informed the American Constitution in

46. *Curtiss-Wright* at 315.

47. See Brief for the United States at 7-9, 15, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

48. *Curtiss-Wright* at 315-22.

49. *Id.* at 324.

50. See legislation listed in *Curtiss-Wright* at 324-27 & n.2 and additional legislation listed in *Panama* at 421-22 (which was noticed in *Curtiss-Wright* at 327).

51. *Curtiss-Wright* at 327.

52. See listing in *Curtiss-Wright* at 328-29.

53. *Field v. Clark*, 143 U.S. 649, 691 (1892).

the field of foreign affairs? His biographer offers a clue, commenting that the “deductive method characterized all of Sutherland’s efforts. Always there was a recurrence to first principles.”⁵⁴ Such a logical style would not tolerate an opinion based on a rule derived inductively. In fact, a careful reading of the section of the opinion on legislative precedent reveals Sutherland did not think that its existence validated the Joint Resolution. His words seem chosen to convey a different meaning: Long-standing practice suggests that there exist independent constitutional justifications for the practice and these justifications are found “in the origin and [early] history of the power involved, or in its nature, or in both combined.”⁵⁵

The discussion of legislative precedent, therefore, did not so much establish a narrower ground for upholding the Joint Resolution as it simply demonstrated the working of underlying principles. The rule of interpretation which Sutherland quoted from *Field v. Clark*⁵⁶ indicated that long-standing legislative practice could be overruled if there existed “a conviction that such legislation was clearly incompatible with the supreme law of the land.” Sutherland prefaced his own statement of the rule⁵⁷ with a similar comment.⁵⁸ Thus, while he later admitted that overturning the legislative practice in question was unlikely,⁵⁹ on balance he strengthened his argument—given his premises—by showing grounds independent of legislative precedent for upholding the Joint Resolution.

Sutherland similarly declined to ground his position on judicial precedent. The government had claimed that *Field v. Clark*⁶⁰ and *Hampton and Company v. United States*⁶¹ “[c]learly . . . controlled” *Curtiss-Wright*.⁶² “The tariff Acts there involved,” said the government, “like the resolution here, were inseparably related to the external relations of the United States.”⁶³ The government also averred that

54. J. PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 15 (1951).

55. *Curtiss-Wright* at 328. See, e.g., “The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day,” *id.* at 322; “a legislative practice such as we have here . . . goes a long way in the direction of proving the presence of an unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined.” *Id.* at 327-28. Had Sutherland meant that long-standing practice established constitutionality, he could have said this less clumsily.

56. See p. 8 *supra*.

57. See *id.*

58. See *Curtiss-Wright* at 327.

59. See *id.* at 329.

60. 143 U.S. 649 (1892).

61. 276 U.S. 394 (1928).

62. See Brief for the United States at 6, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

63. *Id.* at 15.

the early case of *The Aurora*⁶⁴ and other more recent cases—including *Panama*—established the propriety of executive discretion.⁶⁵ It is not difficult to infer why Sutherland omitted this argument. Judicial precedent by itself would have had the same inconclusive quality that he ascribed to legislative precedent. To paraphrase a later comment by Justice Frankfurter,⁶⁶ the Constitution and principles inherent in it, and not what the courts had ruled, remained for Sutherland “the ultimate touchstone of constitutionality.”

Even if judicial precedent had deserved great weight, it did not necessarily support the government: A majority which included Sutherland had recently put its own gloss on *The Aurora*, *Field*, and *Hampton*. In *Panama* the Court had found that delegatory legislation had been upheld in these cases *not* because it fell into a special category of foreign relations legislation, but because the delegation involved was limited, being purely conditional in *The Aurora* and *Field* and administrative in *Hampton*.⁶⁷ The Court did hint that delegation possessed greater validity when it conferred on the President “an authority which was cognate to the conduct by him of the foreign relations of the Government.”⁶⁸ The hint, however, is almost imperceptible. It was placed in a discussion of early legislative acts which, as the Court noted, “were not the subject of judicial decision”⁶⁹ and were interim or short-term in duration.⁷⁰ There were other recent cases involving delegation in foreign affairs,⁷¹ but the government in *Curtiss-Wright* recognized that they dealt only tangentially with the constitutional issue.⁷²

64. *Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

65. See Brief for United States at 15-16, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

66. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

67. See *Panama* at 423-26, 429-30.

68. *Id.* at 422.

69. *Id.*

70. See *id.* at n.9. For further discussion of the interim and short-term nature of these early delegatory acts, see L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 58-61 (1972).

71. See *United States v. Chavez*, 228 U.S. 525 (1913); *United States v. Mesa*, 228 U.S. 533 (1913).

72. See Brief for United States at 15, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Interestingly, the government overlooked a pregnant dictum of Sutherland's in *Carter v. Carter Coal Co.*, 298 U.S. 238, 295 (1936). There, in his opinion for the Court, he had argued that the federal government possessed “no *inherent* power in respect of the internal affairs of the states,” but he had also observed: “The question in respect of the inherent power of that government as to the external affairs of the nation and in the field of international law is a wholly different matter which it is not necessary now to consider” (emphasis in original). Yet, while anticipating Sutherland's position in *Curtiss-Wright* later that year, this section of the *Carter* opinion was concerned with the issue of dual federalism and not with the delegation issue that the government argued in *Curtiss-Wright*. See *id.* at 289-97. The omission is thus understandable. See also note 81 *infra*.

Finally, the opinion in *Curtiss-Wright* cannot be understood apart from Sutherland's own intellectual background. The ideas expounded in *Curtiss-Wright* about the foreign relations power, which the government only fleetingly and vaguely suggested on brief,⁷³ were hardly new to the Justice in 1936. In 1919 he had presented similar views in a book entitled *Constitutional Power and World Affairs*.⁷⁴ This book reiterated a thesis which he had advanced in an article in 1909⁷⁵ and which he possibly acquired from one of his teachers at the University of Michigan Law School.⁷⁶

Both the book and article contended that the power of the federal government with respect to foreign relations was and always had been complete. Such power did not come from delegations by the states or from affirmative grants in the Constitution but derived from external sovereignty inherited by the federal government from Great Britain via the united colonies and the Confederation. In these writings Sutherland had been interested in refuting the doctrine that dual federalism (which he otherwise accepted) placed limitations on federal activity in the external realm. He did not devote much attention to the allocation of the general foreign relations power among the branches of the federal government.⁷⁷ He did claim, however, that *extra-constitutional* action in foreign affairs should not be equated with *un-constitutional* action.⁷⁸ In other words, without directly confronting the separation of powers issue involved in *Curtiss-Wright*, Sutherland developed the ideas he would put into service in strikingly similar language in his later opinion.⁷⁹ Thus, one source of Sutherland's com-

73. The suggestion was made in the government's use of the quotation from *Panama* quoted at p. 10 *supra*. Brief for the United States at 8, 15, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Defendants took notice of this hint in denying that the "Constitution . . . affords any basis for the contention that the power to make laws which may affect our foreign relations may be vested in the Executive instead of in the Congress." Brief for Appellees Allard *et al.* at 10, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In district court the government had been more explicit in advancing an argument similar to the one Sutherland used in *Curtiss-Wright*. See *Curtiss-Wright (S.D.N.Y.)* at 239.

74. G. SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 25-47, 116-26 (1919) [hereinafter cited as SUTHERLAND, *CONSTITUTIONAL POWER*]. This book was based on Sutherland's Blumenthal Lectures at Columbia University in 1918.

75. Sutherland, *Internal and External Powers of the National Government*, 191 NORTH AM. REV. 373 (1910) [hereinafter cited as Sutherland, *Internal and External Powers*]. This also appeared as S. Doc. No. 417, 61st Cong., 2d Sess. (1910).

76. See Paschal, *supra* note 54, at 226-28. See also *id.* at 15-20.

77. For the main exceptions to this statement, see SUTHERLAND, *CONSTITUTIONAL POWER* 70-91 (concerning the locus of the war power) & 122-32 (concerning participation in the treaty power).

78. See *id.* at 55; Sutherland, *Internal and External Powers*, *supra* note 75, at 384.

79. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 469-70, 473-76 (1946) (conveniently collecting pertinent quotations from *Curtiss-Wright* and Sutherland's book and article). Especially compare SUTHERLAND, *CONSTITUTIONAL POWER*, *supra* note 74, at 116-17, 125-26, with *Curtiss-Wright* at 316-17, 320-21.

ments in *Curtiss-Wright* is not difficult to discover: it was Sutherland himself. The case put the Justice in what one writer has called "the happy position of being able to give [his] writings and speeches the status of law."⁸⁰

The fact that the views Sutherland expressed in *Curtiss-Wright* were his own nevertheless does not relegate them to status of dicta. Aside from a personal commitment to these views, he had good reasons for his opening discussion of first principles regarding the foreign relations power. Although it came first in his presentation, the discussion of principles followed from his comments about legislative precedent, and was not logically superfluous. It offered a means of establishing what resort to either legislative or judicial precedent could not conclusively establish and what respect for consistency and tenable distinctions required if the Joint Resolution were to be upheld in the face of *Panama* and *Schechter*.

II. First Principles: Justice Sutherland's Argument and Evidence

Justice Sutherland's fundamental premise was that the external and internal powers of the federal government "are different, both in respect of their origin and their nature." Internally, the government was one of enumerated powers, with the Constitution designed "to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states." However, "since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source." These "international powers" or "powers of external sovereignty" devolved on the federal government from the Confederation government, which in turn acquired them from "the colonies in their collective and corporate capacity as the United States of America." The ultimate source was the British Crown, although its possession of the external sovereignty of the American colonies ceased prior to America's formal independence because "[e]ven before the Declaration [of Independence], the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress" "Rulers come and go," wrote Sutherland; "governments end and

80. Levitan, *supra* note 79, at 476.

forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased it immediately passed to the Union.”⁸¹ To borrow a term from his earlier writings,⁸² Sutherland sought to place the federal government’s foreign relations power on an *extra-constitutional* footing.

After providing additional detail⁸³ Sutherland turned to Joseph Story’s *Commentaries on the Constitution* for “general confirmation of” his position.⁸⁴ Because Sutherland saw fit to rely upon Story, the views of Story are of particular concern in understanding *Curtiss-Wright*. Story advanced three separate meanings of the term “sovereignty.” “By ‘sovereignty’ in its largest sense,” he wrote, “is meant, supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern A State which possesses this absolute power, without any dependence on any foreign power or state, is in this largest sense a sovereign state.”⁸⁵ At the same time, Story noted, “the sovereignty of the government, organized within the state, may be of a very limited nature.”⁸⁶ By this “sovereignty of the government,” or sovereignty in “a far more limited sense,” Story meant “such *political powers*, as in the actual organization of the particular state or nation are to be exclusively exercised by certain public functionaries, without the control of any superior [governmental] authority.”⁸⁷ A third sense of the term, as set forth by Story, is in “speak[ing] of a state as sovereign . . . in reference to foreign states. Whatever may be the internal organization of the government of any state, if it has the sole power of governing itself and is not dependent upon any foreign

81. *Curtiss-Wright* at 315-17. The only immediate citations for these remarks were *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 80-81 (1795), which is discussed at pp. 20-21 *infra*, and *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936). The latter citation is intriguing. In *Carter* Sutherland had hinted at the view he would expound in *Curtiss-Wright* (see note 72 *supra*), but here he used *Carter* merely to support his assertion that internally the federal government was one of enumerated powers. Sutherland’s later citation of Story’s *Commentaries* also covered this material.

82. See SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 74, at 55; Sutherland, *Internal and External Powers*, *supra* note 75, at 384.

83. See pp. 17-21 *infra*.

84. *Curtiss-Wright* at 317 n.1.

85. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 207, at 191-92 (1833) [hereinafter cited as STORY]. I have used the first edition of Story, which is now readily available as a reprint. The text of the sections cited by Sutherland does not vary between the first edition and the fourth edition, which Sutherland used. Pagination does vary, so I have also included section numbers to facilitate use of other editions. The sections of Story relied upon in this and the following three paragraphs are those cited by Sutherland.

86. *Id.* § 208, at 194.

87. *Id.* § 207, at 192 (emphasis added).

state, it is called a *sovereign state*; that is, it is a state having the same rights, privileges, and powers, as other independent states.”⁸⁸

Sutherland recognized that the united colonies, prior to independence, exercised sovereignty in its limited sense—that is, they held certain powers of sovereignty, including some pertaining to external affairs. For Sutherland, though, another *government* was evidently the only possible source for these powers of sovereignty. So, since the states severally had never possessed powers of “external sovereignty,” these powers must have come from Great Britain. In turn, the schemes by which the states vested only enumerated powers in the federal government—that is, de facto arrangements until 1781, the Articles of Confederation from 1781 to 1789, and the Constitution after 1789—had little effect on the allocation and limitation of external powers.

From Story’s perspective, however, there is a flaw in Sutherland’s argument. For Story, the true source of the powers of sovereignty, whether external or internal, was the sovereign in the largest or absolute sense of the term. In the United States “[t]he absolute sovereignty of the nation is in the *people* of the nation . . .”⁸⁹ The people were “the foundation, upon which the super-structure of the liberties and independence of the United States has been erected.”⁹⁰ The only point at which Story came at all close to Sutherland’s view of the transmission of sovereignty was in a passage he quoted from *Chisholm v. Georgia*: “From the crown of Great Britain the sovereignty of their country [that is, the United States] passed to the *people* of it . . .”⁹¹ Yet this establishes the people as the possessors of absolute sovereignty and as the source of governmental power.⁹²

Finally, the sovereignty of the United States “in reference to foreign states”—that is, in Story’s third sense—also had its source in an act of the people. “The people of the united colonies,” wrote Story, “made the united colonies free and independent states, and absolved them from all allegiance to the British Crown.”⁹³ It is difficult to interpret Story as claiming that the Continental Congress held powers of “external sovereignty” by virtue of the sovereign status of the United States “in reference to foreign states.” Instead, the reverse was true: The existence of powers of sovereignty, based on the consent of the

88. *Id.* § 209, at 195 (emphasis in original).

89. *Id.* § 208, at 195 (emphasis added).

90. *Id.* § 214, at 203.

91. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470 (1793), quoted in 1 STORY § 216, at 205 (emphasis is Story’s and does not appear in the original).

92. See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 470-72 (1793).

93. 1 STORY § 211, at 199.

absolute sovereign, gave rise to the sovereignty of the United States "in reference to foreign states." Story specifically linked Congress's authority in the external realm to the approval of people.⁹⁴

Although Story's *Commentaries* fails to support Sutherland's position, a complete evaluation of Sutherland's account of sovereignty in early America requires consideration of the views of Americans in the 1770's and 1780's. In this regard, a recent scholar has written that James Wilson's defense, in 1785, of the constitutionality of the Bank of North America "will . . . suggest to the student of constitutional history the inherent powers doctrine of . . . *Curtiss-Wright*."⁹⁵ Wilson claimed that Article II of the Articles of Confederation, which reserved to the states all powers not expressly delegated to the Confederation government, pertained only to those powers the states had once held. Since no state had held power to incorporate a bank commensurate with the needs of the *United States*, no state could have retained that power. Contrary to Sutherland, however, and like Story, Wilson held that the general powers of the Confederation "result[ed] from the union of the whole" He did not mention England as a possible source.⁹⁶ Moreover, the argument that certain broad powers, not mentioned in the Articles, were vested in the Confederation government independently of state delegation would have no force concerning the foreign relations power, for the Articles gave explicit attention to foreign relations.⁹⁷ Whatever its immediate impact,⁹⁸ Wilson's defense of the bank foreshadowed the popular sovereignty position toward which he and other key figures in the 1780's were slowly moving: *Ab-*

94. See *id.* §§ 213-14, at 200-02.

95. McCloskey, *Introduction*, in *THE WORKS OF JAMES WILSON* 3 (R. McCloskey ed. 1967).

96. See Wilson, *Considerations on the Bank of North America*, in *id.* at 829-30 (quotation is at 829). See generally *id.* at 824-40.

97. See ART. OF CONFED. arts. VI & IX.

98. Professor McDonald describes Wilson as "the ablest spokesman for the theory that sovereignty devolved upon Congress or the whole people," but also claims that during the Confederation period few took Wilson's argument seriously. F. McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790*, at 191 n.+ (1965). Certainly when the bank was chartered in 1781, both Robert Morris, the Confederation's Superintendent of Finance who proposed it, and Congress had doubts about congressional authority in the area. Congress accepted Morris's recommendation that the states be requested to pass enabling legislation. See Letter from Morris to the President of Congress, May 17, 1781, in 4 *THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* 421 (F. Warton ed. 1889); Letter from Morris to the Governors of the States, Jan. 8, 1782, in 5 *id.* at 94-95; 20 *JOURNALS OF THE CONTINENTAL CONGRESS* 545-48 & accompanying notes (1912) (session of May 26, 1781); 21 *id.* at 1190 (session of Dec. 31, 1781); Letter from the Virginia Delegates to the Governor of Virginia, Jan. 8, 1782, in 6 *LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS* 288-89 (E. Buinett ed. 1921). Cf. Letter from Alexander Hamilton to Morris, April 30, 1781, in 2 *THE PAPERS OF ALEXANDER HAMILTON* 604, 630 (H. Syrett and J. Cooke eds. 1961) (tacit admission of Congress's severely limited authority). On Wilson's general relations with the Bank of North America, see C. SMITH, *JAMES WILSON: FOUNDING FATHER, 1742-1798*, at 140-58 (1956).

solute sovereignty could reside with the people, with different governments within the same nation simultaneously possessing different *powers* of sovereignty.⁹⁹

Prior to the late 1780's few Americans accepted the popular sovereignty position, however implicit it may have been in the events and documents of independence.¹⁰⁰ Most of those who paid attention to political issues would have denied that from the beginning of the Revolution the people of the United States (or of the united colonies) were the constitutive body with respect to the emerging central government. They would have agreed that absolute sovereignty is indivisible, and, like William Blackstone, they would have assigned it to a particular legislative body and not to the people at large. An implication of this early position was that absolute sovereignty must rest with either the central government or the state governments, but could not rest with both.¹⁰¹

In 1776 and 1777 Congress debated the proper allocation of sovereignty;¹⁰² the outcome is readily apparent. The second article of the draft plan of union first considered by Congress provided that each colony "reserves to itself the sole and exclusive Regulation and Government of its internal police in all matters that shall not interfere with the Articles of Confederation."¹⁰³ The plan finally approved by Congress and eventually ratified by the states contained a rather different clause: "Each state retains its sovereignty, freedom, and independence and every power, jurisdiction, and right which is not by the confederation expressly delegated to the United States, in Congress assembled."¹⁰⁴ This provision of the Articles, unlike the original draft, did not distinguish between powers of "internal police" and other powers. It is not surprising that in 1786 the Confederation's Secretary for Foreign Affairs, John Jay, reported to Congress that the rights to

99. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 344-89, 524-47 (1969).

100. The challenge to then existing notions of legislative sovereignty is evident in, e.g., the Declaration of Independence.

101. See G. WOOD, *supra* note 99, at 344-83 *passim*, which may be usefully supplemented by two older studies: A. SMALL, *THE BEGINNINGS OF AMERICAN NATIONALITY: THE CONSTITUTIONAL RELATIONS BETWEEN THE CONTINENTAL CONGRESS AND THE COLONIES AND STATES* (8 JOHNS HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE (H. Adams ed. 1890)); Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907). But cf. Nettels, *The Origins of the Union and of the States*, 58 MASS. HIST. SOC. PROC. 68 (1957-60).

102. See M. JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 167-76 (1959); G. WOOD, *supra* note 99, at 354-61. Jensen is not particularly rigorous in distinguishing the congressional sovereignty and popular sovereignty positions, but neither were some of the people he discusses.

103. 5 JOURNALS OF THE CONTINENTAL CONGRESS 547 (1906) (July 12, 1776).

104. ART. OF CONFED. art. II.

make war, peace, and treaties were a part of the "perfect though limited sovereignty" which "the thirteen independent sovereign states" had vested in Congress "by express delegation of power."¹⁰⁵ Congress subsequently approved resolutions embodying Jay's view.¹⁰⁶

As Jay's report exemplifies, contemporary comments on the issue of sovereignty were often imprecise and sometimes contradictory; formulation of a new concept of sovereignty in America was slow and unsystematic.¹⁰⁷ The crucial point is that both the earlier state sovereignty position and the emerging popular sovereignty position, which was arguably manifested in the Constitution,¹⁰⁸ are at odds with Sutherland's views.¹⁰⁹ Each attributes to the central government only those powers delegated by the possessors of absolute sovereignty; neither admits of extra-constitutional powers.

Sutherland nevertheless adduced some specific evidence for his position. He claimed the Treaty of 1783 between Great Britain and the "United States of America" was a "practical application of [the] fact" that external sovereignty passed immediately from Britain to the American Union.¹¹⁰ However, the Articles of Confederation, which went into effect in 1781, had expressly granted to Congress the treaty-making power.¹¹¹

The Constitution, said Sutherland, "was ordained and established . . . to form 'a more perfect Union'" in circumstances where the existing government already "was the sole possessor of external sovereignty." Such sovereignty remained "in the Union . . . without change except in so far as the Constitution in express terms qualified

105. 31 JOURNALS OF THE CONTINENTAL CONGRESS 797-98 (1934) (Oct. 13, 1786) (emphasis added). At issue was state compliance with the terms of the Treaty of Peace with Great Britain. Interestingly, in *The Federalist Papers*, Jay spoke of the treaty power under the Constitution as being delegated without indicating by whom. See *THE FEDERALIST* No. 64, at 432 (J. Cooke ed. 1961).

106. See 32 JOURNALS OF THE CONTINENTAL CONGRESS 124-25, 177-84 (1936) (March 21, April 13, 1787).

107. See notes 99 & 101 *supra*, and A. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 131-36 (1935), which contains an especially perceptive discussion.

108. See, e.g., *THE FEDERALIST* Nos. 39-40 (J. Madison); 1 STORY §§ 350-60, at 318-19; G. WOOD, *supra* note 99, at 529-32, 536-47. The nature of the Constitution, of course, remained unsettled at least until the Civil War. Some still debate it. See, e.g., J. KILPATRICK, *THE SOVEREIGN STATES* (1957).

109. Some commentators on *Curtiss-Wright* seem not to have grasped this, at least as evidenced by their long defenses of the state sovereignty position. See Levitan, *supra* note 32, at 479-89; Patterson, *In re The United States v. The Curtiss-Wright Corporation*, 22 TEXAS L. REV. 286, 304-08, 445-63 (1944).

110. *Curtiss-Wright* at 317. At this point Sutherland himself placed quotation marks around the United States of America.

111. ART. OF CONFED. art. IX. Even so, "the peace treaty . . . was ratified by some states separately, and in New Hampshire it was ratified by individual towns." F. McDONALD, *supra* note 98, at 191 n.†. For specific examples of earlier state action and claims to authority in the area of foreign relations, see Van Tyne, *supra* note 101, at 539-41.

its exercise.”¹¹² The implication regarding the source of the new government’s external powers is as clear as it is misleading. In fact, the Constitution, like the Articles, mentions important aspects of the foreign relations power.¹¹³ Thus it is more accurate to say that the power is vested in the federal government because it is explicitly and implicitly granted by the Constitution and that it ultimately derives not from Britain but from whatever body legally ordained and established the Constitution.

Sutherland’s contention that the Constitutional Convention “was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one”¹¹⁴ is roughly accurate but is irrelevant to his theory. If anything, the implication that the people of the United States were the source of the foreign relations power detracts from his position. To be more accurate Sutherland might have said that the Convention was called because it was felt that the United States *should* be one with respect to foreign affairs (and certain other affairs), but that they could easily become several, and that they were most definitely having a difficult time maintaining themselves internationally as a nation.¹¹⁵ This refined premise, however, also cuts against claiming an extra-constitutional origin for the foreign relations power; it indicates the Constitution was needed to establish a more effective federal power respecting foreign affairs. Indeed, in *The Chinese Exclusion Case*,¹¹⁶ cited at this point by Sutherland as lending some support to his view regarding the inherent, extra-constitutional nature of the foreign relations power, Justice Field had stated: “The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers *delegated* by the Constitution”¹¹⁷

112. *Curtiss-Wright* at 317.

113. See U.S. CONST. art. I, §§ 8 & 10; *id.* art. II, § 2; *id.* art. VI.

114. *Curtiss-Wright* at 317.

115. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (M. Farrand ed. 1911) (May 29, 1787) [hereinafter cited as FARRAND]; THE FEDERALIST Nos. 3 & 5 (J. Jay), 13 (A. Hamilton); P. VARG, FOREIGN POLICIES OF THE FOUNDING FATHERS 46-69 (Penguin ed. 1969); Farrand, *The Federal Convention and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 536 (1908); Marks, *Foreign Affairs: A Winning Issue in the Campaign for Ratification of the United States Constitution*, 86 POL. SCI. Q. 444 (1971). For a brighter view of the Confederation’s prospects, see M. JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789 (1950).

116. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

117. *Id.* at 609 (emphasis added). See also *Fong Yue Ting v. United States*, 149 U.S. 698, 757-58 (1893) (Field, J., dissenting).

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It would seem that Sutherland found firmer support for his position in a statement he quoted from Rufus King, made during the Constitutional Convention:

The States were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or facilities of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.¹¹⁸

An immediate problem with King's statement is a general one that arises when using the Convention's debates to interpret the Constitution. As Madison noted several years later, the state ratifying conventions and not the Philadelphia Convention gave the Constitution its legal "life and validity."¹¹⁹ Moreover, whatever opinion in Philadelphia may have been, it is hardly conclusive *in itself* in determining how Americans of 1787-1788 generally interpreted the Constitution. Nor does it provide any authoritative guide to what Americans thought about the preceding decade of their history either in 1787-1788 or at the time. It may, of course, give insight into ideas and assumptions of the period,¹²⁰ which makes further examination of King's statement worthwhile.

When examined more closely, the King quotation provides scant support for Sutherland's theory, since like most of Sutherland's evidence it says nothing about whether the Confederation's power respecting foreign affairs was inherited, extra-constitutionally, from England or derived from a constitutional source.¹²¹ Elsewhere in the same speech, however, King clearly implied the power was delegated by the states. "If the states [under the Confederation] therefore re-

118. 1 FARRAND, *supra* note 115, at 323 (June 19, 1787) (Madison's notes). Sutherland's version of the quotation, in *Curtiss-Wright* at 317, is taken from an earlier printing of Madison's notes, and differs slightly in spelling, capitalization and punctuation.

119. 5 ANNALS OF CONG. col. 776 (1849) (April 6, 1796).

120. See Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 677-78, 690 n.79 (1972). See also Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340 (1955).

121. "Constitutional" in this context refers, of course, not to the Constitution drafted in 1787 but to the constitutive base of the Confederation government.

tained some portion of their sovereignty," he commented, "they had certainly *divested* themselves of essential portions of it."¹²²

Sutherland did not survey the views of other participants in the Convention. Some of them did state or imply that the states were sovereign under the Confederation.¹²³ Others denied this was the case,¹²⁴ but one of this group—James Madison—later in life claimed he had been misinterpreted.¹²⁵ James Wilson continued to portray the people of the United States as the source of federal authority under the Articles.¹²⁶ Most members did not discuss the issue of sovereignty. None adhered to the position advanced nearly 150 years later in *Curtiss-Wright*.

The early views of the Supreme Court should be accorded considerable weight in interpreting the Constitution and Sutherland recognized this in citing *Penhallow v. Doane*.¹²⁷ However, the opinion he cited, by Justice Patterson, was but one of four seriatim opinions in the case, and it does not support Sutherland's argument. Patterson portrayed the external power of the Continental Congress prior to the ratification of the Articles as deriving not from Great Britain or some other source external to the ordinary constitutive authority, but from the people.¹²⁸ Repeating his opinion on Circuit, Justice Blair took a similar view, although he was ambiguous whether Congress's external authority derived directly from the people or indirectly from the people via the states.¹²⁹ Justices Iredell and Cushing did not doubt that the Continental Congress's power derived from state delegation.¹³⁰

122. 1 FARRAND, *supra* note 115, at 324 (June 19, 1787) (Madison's notes) (emphasis added); *accord*, *id.* at 331 (King's notes). In his own mind King evidently thought the Confederation derived power from both the states and the people. See R. ERNST, RUFUS KING: AMERICAN FEDERALIST 100 (1968).

123. See, e.g., 1 FARRAND, *supra* note 115, at 19, 250, 340-41.

124. See, e.g., *id.* at 324-25, 471.

125. See Letter from Madison to W.C. Rives, Oct. 21, 1833, in 3 *id.* at 521, 522.

126. See 1 *id.* at 329. See Wilson's remarks in the Pennsylvania ratifying convention, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION . . . 432-58 *passim* (J. Elliot ed. 1888) [hereinafter cited as ELLIOT] for a more extended discussion of his views on sovereignty in late 1787.

127. 3 U.S. (3 Dall.) 54, 80-81 (1795), cited in *Curtiss-Wright* at 317. In order of Sutherland's presentation, this was the first piece of evidence cited. I have postponed discussion of it to this point in order to preserve a rough chronological framework.

128. "These high acts of sovereignty were submitted to, acquiesced in, and approved of, by the people of *America*. In Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace." 3 U.S. (3 Dall.) at 80 (emphasis in original).

129. See *id.* at 109-13. For an argument basing congressional authority after independence on grounds similar to those adduced by Patterson, but introducing ambiguities not unlike those in Blair's opinion, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222-23 (1796) (Chase, J., separate opinion).

130. See 3 U.S. (3 Dall.) at 92-95, 117 (separate opinions of Iredell & Cushing, JJ.). The remaining two members of the Court took no part in the decision; Chief Justice Jay was in England on the diplomatic mission which resulted in Jay's Treaty, and Justice Wilson disqualified himself because of an earlier involvement in the case. SMITH,

While each Justice satisfied himself that the Continental Congress, even before ratification of the Articles of Confederation, had held sufficient authority to establish an appellate procedure in Revolutionary War Prize Cases,¹³¹ none of them used arguments supportive of Sutherland's view.

Sutherland missed one piece of evidence from the original Constitution which could be interpreted to support his case. While ordinary legislation is the supreme law of the land if "made in Pursuance" of the Constitution, treaties become supreme law when made under the "Authority of the United States."¹³² In the state ratification debates several antifederalists attacked this arrangement.¹³³ The federalists paid little attention to the problem, concentrating instead on the broader issue of whether the treaty-making process, as specified in the Constitution, contained adequate safeguards for state and regional interests.¹³⁴ This fact may indicate that most federalists agreed treaties were extra-constitutional, or it may indicate that they did not regard the charge as credible enough to warrant refutation.¹³⁵ What the majority of delegates to the state conventions thought is problematic. Whether the original understanding of the status of treaties would support Sutherland is therefore also problematic.¹³⁶ By the time Sutherland wrote

supra note 98, at 372. One can guess, though, that Wilson would have written an opinion similar to Patterson's and that Jay might have done the same or else have tended toward the more ambiguous position espoused by Blair. Arguments of counsel in *Penhallow*, while coming closer to Sutherland's position than did any of the Justices' opinions, still differed from it in significant respects. See 3 U.S. (3 Dall.) at 74, 76.

131. Iredell took a different view of certain other aspects of the case and would have fashioned a slightly different decree.

132. U.S. CONST. art. VI.

133. See, e.g., PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 1787-1788, at 312, 331 (P. Ford ed. 1888); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 1787-1788, at 361 (P. Ford ed. 1892); 4 ELLIOT, *supra* note 126, at 215. These statements all suggest, however, that the real concern of the antifederalists was not the supremacy of treaties over the federal constitution but their supremacy over state constitutions and law—a considerably different issue. For a more direct statement indicating this concern, see, e.g., 3 *id.* at 500-14. For general discussions of the treaty problem in the federal and state conventions, see W. COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 18-49 (1941); S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 43-63 (2d ed. 1916).

134. See, e.g., ESSAYS ON THE CONSTITUTION, *supra* note 133, at 165; PAMPHLETS ON THE CONSTITUTION, *supra* note 133, at 355, 376; 2 ELLIOT 465-66, 476-77, 505-07; 3 *id.* at 292-93, 359, 516; 4 *id.* at 119-21, 280-81; THE FEDERALIST No. 75 (A. Hamilton). See also C. Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271 (1934).

135. It should be noted that in a few instances federalists stated or implied that treaties would be subject to the Constitution in the same way laws were. See 3 ELLIOT 504, 507, 514; 4 *id.* at 28, 271. It may or may not be significant that both Wilson and Madison stated during their respective state ratifying conventions that there probably would be few occasions for concluding treaties. 2 ELLIOT 513; 3 *id.* at 410.

136. Nevertheless, some indication of an original understanding (in the sense of an opinion commanding majority support) that treaties were subject to a higher authority can be gleaned from the Judiciary Act of 1789, which recognized that state courts might rule against the validity of a treaty. See 1 Stat. 73, 85-87 (§ 25) (1789).

Curtiss-Wright the Court had implied that treaties were subject to the Constitution,¹³⁷ and he himself had taken the same view.¹³⁸

In any event, based on the historical evidence outlined above, Sutherland affirmed:

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.¹³⁹

He noted that the Constitution has no extra-territorial force "unless in respect of our own citizens," and thus "the operation of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law." Moreover, "[a]s a member of the family of nations, the right and power of the United States . . . are equal to the right and power of other members of the international family. Otherwise the United States is not completely sovereign."¹⁴⁰

Here again Sutherland showed little appreciation for the several

137. See COWLES, *supra* note 133, at 292-95 *passim*; B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 133-42 (1963). *Missouri v. Holland*, 252 U.S. 416 (1920), held that the Tenth Amendment was not a bar to legislation implementing a valid treaty; it thereby recognized existing authoritative opinion on the subject. See Boyd, *The Expanding Treaty Power*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 410, 422-28 (Am. Ass'n L. Schools ed. 1938). In passing, it should be noted that Professor Schwartz incorrectly concludes, at 135-36, that the wording "under the Authority of the United States" in the Supremacy Clause was included to give validity to preexisting treaties rather than to make treaties superior to the Constitution. On August 23, 1787, the Federal Convention approved the clause with wording which (among other things) provided that "all Treaties made under the authority of the U.S. shall be the supreme law . . ." Two days later the clause "was reconsidered and after the words 'all treaties made' were inserted . . . the words 'or which shall be made [.]' This insertion was meant to obviate all doubt concerning the force of treaties preexisting, by making the words 'all treaties made' to refer to them, as the words inserted would refer to future treaties." 2 FARRAND, *supra* note 115, at 389, 417 (Madison's notes). What was therefore crucial to clarifying the meaning of the clause with respect to the continued validity of preexisting treaties was the insertion of "or which shall be made" and not the use of "under the Authority of the United States," which appeared in both the unclear early version and in the final version. It may well be that Schwartz (who follows Justice Black in *Reid v. Covert*, 354 U.S. 1, 16-17 (1957), on this point) is correct that the Supremacy Clause was not intended to give treaties an extra-constitutional status, but the evidence he adduces does not prove it. Professor Corwin fell into the same trap. See E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 421 n.17 (1957).

138. See SUTHERLAND, CONSTITUTIONAL POWER, *supra* note 74, at 141-65 *passim*. In fact, Sutherland anticipated Holmes's argument in *Missouri v. Holland*, 252 U.S. 416 (1920), but with additional emphasis that such an argument is not tantamount to putting treaties above the Constitution. See SUTHERLAND, CONSTITUTIONAL POWER 153-58.

139. *Curtiss-Wright* at 318.

140. *Id.*

meanings of "sovereignty" which Joseph Story had discussed.¹⁴¹ He also largely ignored the fact that the Constitution provides either an explicit or implicit, but still evident, authority for treaties and other international understandings and compacts.¹⁴² A similar problem arises in his interpretation of the cases¹⁴³ in which, he claimed, the Supreme Court had recognized that the United States Government held specific powers relating to foreign relations by virtue of its sovereign status under international law. These cases do state that the American nation possesses the powers incident to any sovereign nation. They also suggest that those powers reside in the federal government (or the President) by virtue of constitutional grants.¹⁴⁴

Sutherland concluded his discussion about the nature of federal power in foreign affairs with a quotation from the then-recent case of *Burnet v. Brooks*. "As a nation with all the attributes of sovereignty," Chief Justice Hughes had argued, "the United States is vested with all the powers of government necessary to maintain an effective control of international relations."¹⁴⁵ This case, considered alone, came closest to supporting Sutherland's thesis about an inherent federal foreign relations power. Hughes recognized only such limitations to federal authority in foreign affairs as were imposed by the Constitution.¹⁴⁶ But *Burnet* included no extended discussion of the point, comparable to that found in *Fong Yue Ting*,¹⁴⁷ and as authority for the statement quoted by Sutherland,¹⁴⁸ Hughes relied on *Fong Yue Ting*¹⁴⁹ and a concurring opinion in *The Legal Tender Cases*.¹⁵⁰ Justice Gray's opinion for the court in *Fong Yue Ting* had traced the federal foreign relations power to specific constitutional grants.¹⁵¹ Justice Bradley's

141. See pp. 13-14 *supra*.

142. U.S. CONST. art. I, §§ 8 & 10; *id.* art. II, § 2.

143. *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 *passim* (1893); *Jones v. United States*, 137 U.S. 202, 212 (1890); all cited in *Curtiss-Wright* at 318.

144. See *Altman & Co. v. United States*, 224 U.S. 583, 600-01 (1912); *Fong Yue Ting v. United States*, 149 U.S. 698, 704-12 (1893); *Jones v. United States*, 137 U.S. 202, 223 (1890). Among these, *Fong Yue Ting* contained the most extensive discussion of the issue; here the Court, per Justice Gray, reviewed in detail the specific constitutional provisions from which the federal foreign relations power derives. See 149 U.S. at 711-12. Contrary to Sutherland's implication, *Altman*, strictly speaking, did not involve the constitutional problem of the extent of the federal government's authority to conclude international agreements other than treaties, but rather the problem of interpreting the meaning of "treaties" within § 5 of the Circuit Court of Appeals Act of 1891, 26 Stat. 826, 828. See 224 U.S. at 600-01.

145. *Burnet v. Brooks*, 288 U.S. 378, 396 (1933), quoted in *Curtiss-Wright* at 318.

146. 288 U.S. at 400.

147. *Fong Yue Ting v. United States*, 149 U.S. 698, 711-15 (1893).

148. See text accompanying note 145 *supra*.

149. See 288 U.S. at 396.

150. *Knox v. Lee and Parker v. Davis*, 79 U.S. (12 Wall.) 457, 554 (1871) (Bradley, J., concurring).

151. See 149 U.S. at 711-12.

concurrence in *The Legal Tender Cases* had based the federal powers over war and foreign relations on specific grants and on the fact that the states were forbidden to enter the field. Bradley spoke of "inherent" powers, but he seems to have been referring to such powers as were regarded as necessary to a general government when the Constitution was adopted and thus were implicitly vested in the federal government by the Constitution.¹⁵²

The federal foreign relations power now tottering on an extra-constitutional footing, Sutherland asserted that "participation in the exercise of the power is significantly limited."¹⁵³ In its exercise the President was the key figure, having important roles in treaty-making and foreign negotiation generally.¹⁵⁴ Sutherland spoke of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹⁵⁵ Sutherland supported this view with several pieces of historical evidence.

One item was John Marshall's statement in the House of Representatives that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁵⁶ Since these words of Marshall have often been quoted, it is worthwhile to put them in context. At issue was whether President John Adams had acted properly in extraditing a British subject to England on a murder charge pursuant to the Jay Treaty of 1795. After the statement just quoted, Marshall continued:

Of consequence, the demand of a foreign nation can only be made on [the President].

He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

152. See 79 U.S. (12 Wall.) at 556. In a similar fashion, the Court in *The Legal Tender Cases* traced Congress's authority to make Treasury notes legal tender (1) to powers enumerated in the Constitution, (2) to powers implied by those enumerated powers, and (3) to "powers [which] were understood by the people who adopted the Constitution to have been created by it, [although such] powers [were] not enumerated and not included incidently in any of those which were enumerated . . ." *Id.* at 534 (emphasis added).

153. *Curtiss-Wright* at 319.

154. See *id.* at 319-21.

155. *Id.* at 320.

156. 10 ANNALS OF CONG. col. 613 (1851) (March 6, 1800), quoted in *Curtiss-Wright* at 319.

He is charged to execute the laws. A treaty is declared to be law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been described? *Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract;* but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.¹⁵⁷

Marshall, in other words, was claiming that the President's power could range from ministerial to discretionary, depending on what Congress had or had not done. It is difficult to extract from Marshall's comments an endorsement of unlimited executive discretion in foreign policy-making.

Another purported piece of evidence was an 1816 report of the Senate Foreign Relations Committee on instructing the President concerning a commercial treaty with Great Britain.¹⁵⁸ Stressing that the President was "the constitutional representative with regard to foreign nations," the Committee held that Senate interference threatened the design, secrecy and dispatch necessary for successful negotiations and hence would impair national security.¹⁵⁹ Taken as a whole, however, the Report included a mixture of grounds for not instructing the President. For one thing, the President already knew the Senate's sentiments on the subject.¹⁶⁰ For another, the proposed Senate resolutions only duplicated past diplomatic instructions.¹⁶¹ Further, the Report justified the Senate's noninvolvement in the negotiation process by noting "that if any benefits be derived from the division of the legislature into two bodies, the more separate and distinct in practice the negotiating and treaty ratifying [*sic*] powers are kept, the more safe the national interests."¹⁶² The Committee thereby praised the require-

157. 10 ANNALS OF CONG. cols. 613-14 (emphasis added).

158. See *Curtiss-Wright* at 319.

159. Foreign Relations Comm. Report of Feb. 15, 1816, in 8 COMPILATION OF REPORTS OF THE COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE 1789-1901, S. DOC. NO. 231, 56th Cong., 2d Sess. 28 (1901).

160. See *id.*

161. See *id.* at 23.

162. *Id.* at 24-25.

ment of *independent* Senate approval. Surely this indicated a conclusion that *if* the President had any independent authority, it extended only to the process of negotiation. Even the portion of the Report quoted by Sutherland affirmed that the President, in his conduct of foreign relations, "is responsible to the Constitution."¹⁶³ The Committee implicitly asserted that, pursuant to the Constitution, the Senate could instruct the President: instruction was simply unwise on prudential grounds.¹⁶⁴ (On other occasions, in fact, the Senate did advise on treaties, independently of consenting to them.)¹⁶⁵

In 1796 the House of Representatives requested that it be given documents relating to the Jay Treaty before it appropriated funds for implementing the Treaty. Sutherland approvingly quoted¹⁶⁶ President Washington's denial of the request, a denial which echoed the claim in *Federalist* No. 64 that sharing information with the House might compromise the secrecy requisite to successful negotiations.¹⁶⁷ But again, this "evidence" on balance detracts from the Justice's position. Washington's reply turns out as a claim not for independent presidential authority, but for the independence of the treaty-making power—that is, the President *and* the Senate. Washington not only did not view his foreign relations power as resting on an extra-constitutional base, but he specifically linked it to the Constitution and the intentions of its framers and adopters.¹⁶⁸ When Sutherland commented that "the wisdom of [Washington's refusal to provide information to the House] was recognized by the House itself and has never since been doubted,"¹⁶⁹ he was wrong. The House debate which followed Washington's response showed the President had not convinced some members. Resolutions reaffirming the House's position passed by a 57-to-35 margin.¹⁷⁰ A half century later Representative John Quincy Adams

163. *Id.* at 24.

164. *See id.* at 23-25.

165. *See* CRANDALL, *supra* note 133, at 72-74; Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 248 (1922) (containing several instances not mentioned by Crandall). Sutherland had previously recognized a senatorial role in initiating treaties. *See* SUTHERLAND, *CONSTITUTIONAL POWER*, *supra* note 74, at 123.

166. *See* Curtiss-Wright at 320-21.

167. *See* Message to the House of Representatives, March 30, 1796, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 186-87 (J. Richardson comp. 1897); *THE FEDERALIST* No. 63 (J. Jay).

168. *See* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 167, at 187-88. Washington's view that the state ratifying conventions agreed that the House would have no independent judgment regarding treaties is questionable, although no definitive assessment of the original understanding on this point is possible. Wilson and Madison in their state conventions pictured the House as having an "influence" on treaty-making. *See* 2 ELLIOT, *supra* note 126, at 507; 3 *id.* at 347. *But cf.* *THE FEDERALIST* No. 75, at 506-07 (A. Hamilton). Other federalists suggested that making commercial treaties would require the participation of the House. *See* 3 ELLIOT 365; 4 *id.* at 48, 267.

169. Curtiss-Wright at 320.

170. *See* 5 ANNALS OF CONG. cols. 762-83 (1849) (March 31-April 7, 1796).

conceded that the memory of Washington was “reverenced next to worship” but still argued that “the President was wrong in that particular instance [in 1796] and went too far to deny the power of the House”¹⁷¹ During the century following the 1796 episode, on several occasions the House or individual committees or representatives asserted that body’s prerogatives with respect to treaties and foreign affairs.¹⁷²

The congressional practice of *requesting* the State Department to furnish information “if not incompatible with the public interest,” while *directing* other Departments to do so, claimed Sutherland, evidenced recognition of “[t]he marked difference between foreign affairs and domestic affairs”¹⁷³ The uncertainties attending foreign situations, plus the need sometimes to condition congressionally-authorized presidential action in foreign affairs on confidential information, further indicated “the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.”¹⁷⁴ These remarks, however, took Sutherland from an exposition of the original theory of the Constitution—that is, from first principles, which might admittedly be disclosed by *early* practice—to *general* practice and considerations of prudence. Yet, if general practice controlled the issue, his entire exposition of first principles was unnecessary. If prudence argued for imposing looser standards on foreign affairs delegation, then the issue was delegation and not independent presidential authority. Sutherland’s overall point seems precisely to have been that it was the extra-constitutional nature of federal power in foreign affairs which allowed prudential considerations to override normal limitations on such power. The ultimate question must be whether the Justice had already succeeded in demonstrating the extra-constitutional nature of federal power in foreign affairs.

Undaunted, Sutherland closed his exposition of constitutional historical premises by quoting from *Mackenzie v. Hare*: “As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers.*”¹⁷⁵ In *Mackenzie*, though, the issue of which branch

171. CONG. GLOBE, 29th Cong., 2d Sess. 167 (Jan. 13, 1848).

172. See 2 A. HIND, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. Doc. No. 355, 59th Cong., 2d Sess. 979-88, 1006-27 (1907).

173. *Curtiss-Wright* at 321.

174. *Id.* at 321-22.

175. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915), quoted in *Curtiss-Wright* at 322 (emphasis added by Sutherland).

might exercise certain powers was missing as was the delegation issue. In addition, the quoted section of *Mackenzie* rested on simple assertion and tended, as did Sutherland himself,¹⁷⁶ to confuse the powers of sovereignty possessed by a government, sovereignty in what Justice Story had called its absolute sense, and sovereignty as a relationship between nations. More important, the section was dicta. Immediately after the words quoted by Sutherland, Justice McKenna had continued: "But [such] monition is not necessary in the present case. There need be no dissent from the cases cited by the plaintiff [who had been stripped of her citizenship after she married a foreigner]; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions upon it."¹⁷⁷ Mrs. Mackenzie had argued that only voluntary expatriation can divest one of citizenship. McKenna found that her voluntary act of marrying a foreigner in full knowledge of existing law constituted voluntary expatriation.¹⁷⁸ *Mackenzie* thus gave minimal support to Sutherland's position.

III. The Verdict on *Curtiss-Wright*

Attempting to assess *Curtiss-Wright's* impact is hazardous. A recent writer holds that the tradition of "foreign policy . . . [being] set aside as a Presidential preserve . . . owes much to the *Curtiss-Wright* decision"¹⁷⁹ In discussing Franklin D. Roosevelt's actions prior to American entry into World War II, Arthur Schlesinger, Jr. contends that while avoiding "grandiose claims of executive authority," F.D.R. was "doubtless encouraged by Justice Sutherland and the *Curtiss-Wright* decision"¹⁸⁰ Nevertheless, it is not clear that the decision greatly changed the nation's direction. The apparent demise of the *Panama-Schechter* doctrine as regards domestic legislation¹⁸¹ indicates there is little reason to conclude that an adverse decision would neces-

176. See pp. 13-14, 22-23 *supra*.

177. *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915).

178. See *id.* at 310-12.

179. L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 207 (1972).

180. Schlesinger, *Congress and the Making of American Foreign Policy*, 51 FOREIGN AFFAIRS 78, 92 (1972). "That there was not a more vigorous and sustained challenge to the constitutionality of the lend-lease measure during the course of its enactment [in 1941] can be explained only by reference to the scope of the delegation of power in the field of foreign relations sanctioned by [*Curtiss-Wright*]." Jones, *supra* note 24, at 574.

181. See Jaffe, *An Essay on Delegation of Legislative Power*, in *SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-1962*, at 89, 116-19 (Comm. of Ass'n of Amer. Law Schools ed. 1963); L. FISHER, *supra* note 179, at 71-74. In large part because of Professor Jaffe's comments, I have used the wording "apparent demise."

sarily or likely have had a lasting impact on the permissible limits of delegation in foreign affairs. It probably would not even have affected the neutrality legislation of the latter 1930's.¹⁸² More generally, extensive presidential power can be upheld without reference to *Curtiss-Wright*.¹⁸³ And the existence of *Curtiss-Wright* has not kept Congress from contributing to the formulation of foreign policy—a fact which Senator J. William Fulbright recognized as early as 1961.¹⁸⁴

There remains another sort of historical judgment to render on *Curtiss-Wright*. The decision has had, and may continue to have, importance within particular legal and political controversies. By being available as authoritative precedent, it decreases the need to confront directly certain basic constitutional issues. As described at the beginning of the article,¹⁸⁵ the decision has in fact been used to support several propositions pertaining to the Constitution and foreign affairs. Whether it actually supports these propositions can now be assessed.¹⁸⁶

That the United States possesses all the powers of a sovereign nation is undoubtedly correct. That the federal government thereby *inherently* holds these powers or holds them at all does not automatically follow. Far from supporting the contention that external sovereignty devolved on the federal government ultimately from Great Britain and hence has an extra-constitutional base, Sutherland's historical evidence and judicial precedents suggest the opposite: Federal power in foreign

182. The main "fact" which the neutrality acts required the President to find was the existence of a state of war among foreign nations. This is arguably more specific than the "fact" that an American embargo might contribute to reestablishment of peace. Moreover, once the President found that war existed abroad, these Acts (except for the 1935 Act) gave him little discretion concerning the actions he was required to take. See Act of November 4, 1939, 54 Stat. 4 (1939); Act of May 1, 1937, 50 Stat. 121 (1937); Act of February 29, 1936, 49 Stat. 1152 (1936); Act of August 31, 1935, 49 Stat. 1081 (1935). In practice, of course, President Roosevelt retained a measure of discretion—for example, by simply failing to "find" that China and Japan were at war. See R. DIVINE, *THE ILLUSION OF NEUTRALITY* 200-19 (1962).

183. See, e.g., Prepared Statement and Testimony of Professor John Norton Moore, April 25, 1972, in *Hearings on Congressional Oversight of Executive Agreements Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 140, 149-60, 173-74 (1972); Prepared Statements of John R. Stevenson, Legal Advisor, Dep't of State, and William H. Rehnquist, Ass't Att'y Gen., July 1, 1970, in *Hearings on Congress, The President, and The War Powers Before the Subcomm. on National Security Policy and Scientific Developments, House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 205-16 (1970). But arguments which run counter to *Curtiss-Wright* may more generally call into question other sweeping assertions of executive prerogative in foreign affairs.

184. See Fulbright, *American Foreign Policy in the 20th Century under an 18th Century Constitution*, 47 CORNELL L.Q. 1, 3-6 (1961). In 1961 Senator Fulbright, on balance, still lamented the congressional input. For a discussion of Congress's impact on foreign policymaking in recent years, see FISHER, *supra* note 179, at 212-35; F. WILCOX, CONGRESS, THE EXECUTIVE AND FOREIGN POLICY (1971).

185. See pp. 3-5 *supra*.

186. The following assessments rest on the detailed analysis of *Curtiss-Wright* already presented, so except where additional evidence is introduced I have not deemed it necessary to include further documentation.

affairs rests on explicit and implicit constitutional grants and derives from the ordinary constitutive authority. Whether Americans in 1787-1788 and earlier regarded this authority as resting with the states or with the people of the United States is not entirely clear, for there was no universally accepted view of the matter. Neither alternative provides an extra-constitutional base for the foreign relations power. One need not rely on *Curtiss-Wright* to limit state participation in foreign affairs: the Constitution imposes severe limitations.¹⁸⁷ Congressional authority finds similar explicit and implicit bases in the Constitution. Sutherland himself admitted that federal power in foreign relations was limited by specific prohibitions in the Constitution.

Sutherland uncovered no constitutional ground for upholding a broad, inherent, and independent presidential power in foreign relations. So, since an extra-constitutional base for the general foreign affairs power is also missing, no basis exists for concluding that the Constitution's allocation of foreign relations power between the branches may be constitutionally ignored. This is not to say that a clear allocation emerges from the Constitution or that any concrete understanding respecting allocation in the field of foreign affairs existed in 1787-1788. However, from both Sutherland's evidence and from other sources, hints of an implicit understanding do emerge. Americans of that day probably accorded Congress a coordinate, if not a dominant, role in the initiation of war, whether declared or not.¹⁸⁸ Control of commercial policy was largely assigned to Congress,¹⁸⁹ and contemporaries thought that commercial relations would constitute a major portion of America's overall relations with the world.¹⁹⁰ Treaty-making involved both the President and the Senate; some Americans in 1787-1788 may have thought that the House would also have an input into treaty-making. John Marshall, at least in 1800, evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker. Marshall indicated that Congress could modify the President's

187. Cf. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 173 (1957). In the same discussion, however, Corwin mistakenly equates Sutherland's theory in *Curtiss-Wright* with Justice Patterson's in *Penhallow v. Doane*. See p. 20 *supra*.

188. See Lofgren, *supra* note 120. But cf. THE FEDERALIST No. 70, at 471 (A. Hamilton): "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . ." However, besides making a claim which is quite narrow on its face, Hamilton in context is *not* defending the President against Congress. His purpose, instead, is to defend the executive office as established by the Constitution against antifederalist arguments for a plural Executive. See *id. passim*.

189. See U.S. CONST. art. I, § 8.

190. See, e.g., F. GILBERT, *THE BEGINNINGS OF AMERICAN FOREIGN POLICY: TO THE FAREWELL ADDRESS* (1965); VARG, *supra* note 115, at 1-69.

diplomatic role. Sutherland made no direct claim in *Curtiss-Wright* that the President possessed authority to conclude international agreements other than treaties. He simply stated that authority existed for the United States as a nation to do so—a contention that his evidence neither proved nor disproved.¹⁹¹ Sutherland said little that bears on the question of executive privilege vis-à-vis Congress. Certainly the evidence he reviewed gives no support to claims that the Executive has an inherent power to maintain the confidentiality of information in its possession.

Sutherland adduced no evidence, other than practice, that restrictions imposed by the Constitution on delegation of legislative power do not apply equally to delegation involving both domestic and foreign affairs. His evidence, other than practice,¹⁹² leads to precisely the opposite conclusion.

In view of the doctrinal climate of the mid-1930's respecting delegation and Sutherland's comments on the need to go beyond practice to constitutional principles, there is no basis for regarding as dictum *Curtiss-Wright's* contention that federal power involving foreign affairs rests on a different base than federal power in domestic affairs. Similarly, its contention about independent presidential power is not dictum. If practice does not conclusively establish the Constitution's meaning, advancing either or both of these contentions was not superfluous to upholding the validity of the Chaco arms embargo. Quite the contrary: These contentions are necessary elements in Sutherland's opinion.¹⁹³ On its face, moreover, *Curtiss-Wright* arguably loosens restrictions on domestic delegation when such delegation is necessary to the conduct of foreign relations.¹⁹⁴ It contains grounds which obviate the need for senatorial approval of certain international agreements. It does not narrow Congress's power to declare war, for Sutherland recognized that specific constitutional provisions placed restrictions on

191. For sounder arguments, see W. McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, in M. McDUGAL, H. LASSWELL, W. BURKE, F. FELICIANO, L. LIPSON, *STUDIES IN WORLD PUBLIC ORDER* 404 (1960).

192. For a brief discussion of the support found in actual practice for Sutherland's view of presidential power, see Prepared Statement of Professor Alfred H. Kelly, April 25, 1972, in *Hearings on Congressional Oversight of Executive Agreements*, *supra* note 183, at 176, 178.

193. These contentions would not be dicta even if practice alone did establish Sutherland's conclusion. "[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (citations omitted). See generally Note, *Dictum Revisited*, 4 STAN. L. REV. 509 (1952).

194. The resolution and presidential actions upheld in *Curtiss-Wright* placed restrictions on domestic activities, that is, on arms sales in the United States to foreign countries, in an effort to influence a foreign situation.

the exercise of external powers, but otherwise it implicitly supports executive authority to use the armed forces in implementing foreign policy objectives.

If one not only accepts Sutherland's premise about the need to resort to first principles rather than practice in constitutional interpretation, but also tests the historical accuracy of Sutherland's evidence, *Curtiss-Wright* does not support the existence of an extra-constitutional base for federal authority, broad independent executive authority, or laxness in standards governing delegation. It certainly invests the President with no sweeping and independent *policy* role. If, conversely, one casts aside the notion that first principles are controlling, then *Curtiss-Wright's* comments about actual practice provide support for the proposition that delegation in foreign affairs need not be so strictly controlled as Sutherland himself probably thought domestic delegation should be. This, though, is not to say that the past practice reviewed in *Curtiss-Wright* or the legislation therein at issue involved delegation broader than the domestic delegation which has been upheld since 1936.

In sum, it is incorrect to dismiss major segments of *Curtiss-Wright* as dicta. But the history on which those segments rest is "shockingly inaccurate."¹⁹⁵ If good history is a requisite to good constitutional law, then *Curtiss-Wright* ought to be relegated to history.

195. I borrow this phrase from Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 76 (1963).